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No. 07-1054

In the Supreme Court of the United States

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

HAJI BISMULLAH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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This case concerns the scope of the record for review of enemy combatant determinations under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739. That important question split the court of appeals, generated five separate opinions on petition for rehearing en banc, and is interconnected with the issues now pending before the Court in *Boumediene* v. *Bush* and *Al Odah* v. *United States*, Nos. 06-1195 & 06-1196 (argued Dec. 5, 2007). Respondents' extensive merits discussion, see Br. in Opp. 17-25, only underscores the importance and complexity of the question presented. Accordingly, the Court should hold this case pending the disposition of *Boumediene* and *Al Odah* or grant certiorari and order expedited briefing and oral argument.

A. The Question Presented Is Important And Intertwined With The Questions In *Boumediene* And *Al Odah*

1. Respondents do not dispute the importance of the question presented in this case. To the contrary, their near-exclusive focus on the merits emphasizes the centrality of that question to DTA review and demonstrates the critical need for this Court's intervention. See Br. in Opp. 17-25. The court of appeals' 5-5 split on rehearing en banc, in five separate opinions (several of which emphasized the need for this Court's review), Pet. App. 67a-102a, as well as the decision of one Judge on the original panel to urge the court to hear the case en banc, *id.* at 83a-89a (Henderson, J., dissenting from denial of rehearing en banc), likewise underscores the importance of the issues raised by this case.

At the same time, as this Court and several Judges of the court of appeals recognized, the question presented here is interconnected with the questions now before the Court in *Boumediene* and *Al Odah*. See *Boumediene* v. *Bush*, cert. granted, 127 S. Ct. 3078; Pet. App. 82a (Ginsburg, J., concurring in denial of rehearing en banc); *id.* at 83a (Garland, J., concurring in denial of rehearing en banc); *id.* at 89a n.6 (Henderson, J., dissenting from denial of rehearing en banc); *id.* at 96a (Randolph, J., dissenting from denial of rehearing en banc). Respondents recognize as much, because they argue throughout their brief about the adequacy of DTA review, Br. in Opp. 2, 11, 20-21, 23-25, 26, which is central to the issues pending in *Boumediene* and *Al Odah*.

Respondents hypothesize (Br. in Opp. 35-36) various ways in which this Court could decide *Boumediene* and *Al Odah* that would minimize the decision's impact on this case. But they acknowledge (Br. in Opp. 1) that this

case, like *Boumediene* and *Al Odah*, raises critical issues about the scope of judicial review available to Guantanamo Bay detainees, and this Court's decision in *Boumediene* and *Al Odah* will clarify how judicial review for detainees must proceed, see Pet. 18-19. Holding this case for the Court's decision in *Boumediene* and *Al Odah* is a modest and common-sense response to the court of appeals' decision. See Pet. 29-32; pp. 8-11, *infra*.

2. Contrary to respondents' repeated assertions (Br. in Opp. 1, 3, 16, 34-35), the government is not seeking certiorari review for purposes of delay. The government sought expedited rehearing en banc before the court of appeals and sought expedited consideration of the petition for a writ of certiorari and the merits of this case, so that this case may be decided this Term. Respondents have consented to such a schedule. Even if this Court were to hold this case pending its decision in *Boumediene* and *Al Odah* and then grant the petition, vacate the decision below, and remand the case to the court of appeals, briefing in the court of appeals could proceed on an expedited basis—in a matter of months. And the Court's decisions in *Boumediene* and *Al Odah* presumably will streamline, perhaps substantially, the issues in the subsequent litigation.

In the meantime, respondents may proceed with judicial review based on the existing CSRT record. The government has already provided to all but one of the respondents in this case the evidence that was presented to and considered by the CSRT, including classified material.[1] Shortly after receiving those classified CSRT

[1] Material was not provided to counsel regarding respondent Abdusabour, because counsel has not provided adequate evidence of their authority to represent Abdusabour. See Pet. App. 42a (protective order).

records, five of the respondents asked the court of appeals to dispose of their cases based upon those records. In the first of those cases, *Parhat* v. *Gates*, No. 06-1397, the court of appeals ordered immediate merits briefing, which is now complete, and expedited oral argument, which is currently scheduled for April 4, 2008. Respondents are thus wrong in claiming (Br. in Opp. 16) that "the judicial branch finds itself without a single case even briefed." Indeed, as explained below, pp. 5-7, *infra*, respondents can obtain meaningful DTA review on the records they have already received.

B. The Court Of Appeals' Decision Is Fundamentally Flawed

1. Respondents have not disputed—and cannot dispute—that the court of appeals' conception of the record on review goes well beyond any known administrative or judicial context. Settled principles of administrative law, reflected in 28 U.S.C. 2112, make clear that judicial review is generally limited to the record before the initial decisionmaker. Pet. 20-21. Yet the court of appeals found that Guantanamo Bay detainees are entitled to procedural protections greater than those afforded by the Constitution to United States citizens in the criminal context, see *Brady* v. *Maryland*, 373 U.S. 83 (1963), and in the enemy-combatant context, see *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 513-539 (2004) (plurality opinion). Respondents attempt to justify that anomalous result by explaining that they deserve greater procedural protections than citizens because they believe DTA procedures are inadequate and they suspect Congress felt the same way. Br. in Opp. 20-21, 24-25. But respondents' repeated attacks on the DTA review process merely highlight the interconnection of this case

with *Boumediene* and *Al Odah*, Pet. 16-19, and Congress surely did not intend that the review of CSRT determinations would exceed any known judicial or administrative parallel.

Contrary to respondents' argument (Br. in Opp. 17), the text of the DTA does not resolve this issue. Nothing in the DTA defines the record on review. See, *e.g.*, Pet. App. 90a-91a (Randolph, J., dissenting from denial of rehearing en banc). Indeed, to the extent that the text of the DTA speaks to the issue, it suggests that the record is comprised of only the material presented to the CSRTs, because Congress authorized the court of appeals to review whether the CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," DTA § 1005(e)(2)(C), 119 Stat. 2742, and those standards and procedures explicitly define the "record" as consisting of evidence actually presented to and considered by the CSRTs. Pet. App. 140a-141a; see Pet. 21-23. The extensive legislative history, moreover, documents Congress's intent to streamline judicial review for Guantanamo Bay detainees in a manner that is fundamentally incompatible with the unprecedented breadth of the record on review conceived by respondents. See Pet. 23-24.

2. The court of appeals may perform its authorized review functions under the DTA without expanding the record on review beyond the material considered by the CSRTs. For example, CSRT procedures require the recorder to present to the CSRT any relevant, exculpatory evidence. Pet. App. 138a, 144a. As the criminal context amply demonstrates, courts are able to ensure that exculpatory evidence has been produced without requiring the government to lay bare its files. Pet. 25-26. Indeed, counsel in this case claim to have exculpatory material

that was improperly excluded from CSRT proceedings, Br. in Opp. 1, 3-6, 9-11, and they may present that evidence to the court of appeals for its consideration, see Pet. 27.[2]

Respondents similarly claim to have other evidence that CSRT procedures have not been followed, Br. in Opp. 8-12, 23, 30, which they obtained without requiring the government to construct a hypothetical record on review. They can present those materials to the court of appeals through DTA review as well. Further, an expanded record is not required to judge whether a preponderance of the evidence supports a detainee's designation as an enemy combatant, because it is well settled that the "preponderance of the evidence" standard refers to the evidence presented to the tribunal, not to some other set of information that could have been presented. Pet. 26-27.

The recent briefing in the *Parhat* case demonstrates that a detainee, represented by counsel with access to the classified CSRT record, can raise numerous potentially dispositive challenges to his detention as an enemy combatant. For instance, Parhat has challenged whether an individual who is not a member of al Qaida or the Taliban, and who purportedly did not intend to support those groups, can nevertheless be detained as an enemy combatant; whether an individual who himself does not directly engage in hostilities against the United States can be detained; whether the President's powers under Article II of the Constitution provide an independent basis for his detention; and whether appropriate relief

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[2] Respondents have another alternative as well, which is to utilize Department of Defense procedures regarding "new evidence," which expressly authorize CSRTs to consider material, exculpatory evidence that was not presented to the original CSRTs. See Pet. App. 177a-181a.

under the DTA would be remand or release. Pet. Br. at 12-28, *Parhat*, *supra*. In addition to the *Parhat* case, the court of appeals has also set briefing schedules in four other cases brought by respondents. Meaningful judicial review is therefore available on the classified CSRT records.

3. Respondents devote much of their brief (Br. in Opp. 3-6, 8-12) to protestations of innocence and distortion of the facts regarding the CSRT process provided. Word limitations prevent a full response to those misstatements. But two matters deserve mention here.

First, respondents' claims (Br. in Opp. 3-6) that they and the other detainees are innocent civilians are without basis. For example, in the recent merits briefing in *Parhat*, the government has explained that Parhat underwent military training at an al Qaeda and Taliban sponsored military training camp before he was captured by coalition forces. The classified brief (which will be made available to this Court upon request) details facts about the camp and persons trained there and about the organization of which Parhat was a member. See Classified Gov't Br. (corrected) at 5-7, 9-10, 18-24, *Parhat*, *supra*; Classified App. at 20-21, 24, 36-37, 42-44, 49-52, 74, 82-83, 86, 100, *Parhat*, *supra*. The unclassified CSRT record likewise shows that Bismullah was a member of the Taliban; received AK-47s, vehicles, and communications devices from that group; was affiliated with Fidayan Islam, a terrorist group that targeted U.S. and coalition forces; and was directed by that group to identify and kill those Afghanis who supported U.S. forces. See Unclassified CSRT Record, encl. (1) at 1, encl. (3) at 5-6, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir.).

Second, respondents are mistaken in contending that the government did not comply with CSRT procedures.

Contrary to respondents' suggestion (Br. in Opp. 11), recorders did not routinely withhold relevant exculpatory information from the CSRTs. Admiral McGarrah unequivocally stated just the opposite, explaining that all identified exculpatory information was always presented to the CSRTs, unless that material was merely duplicative or was not relevant to an asserted basis of a detainee's enemy combatant status. Pet. App. 236a. Respondents are also mistaken in contending (Br. in Opp. 9-10, 32 n.23) that identification and review of the Government Information was delegated to private contractors whose access to classified information was limited to portions of two databases. As the cited sources make clear, that role was performed by Defense Department personnel, including reservists. See, *e.g.*, Resp. Stay Opp. App. 291 ¶ 5. Only two contract analysts were used for a short period to perform limited tasks in assisting the recorder team. In addition, Admiral McGarrah explained that although Defense Department personnel initially turned to the two databases that were expected to contain the vast majority of relevant information, searches were not limited to the information contained in those databases. Pet. App. 230a-232a.

In all events, these matters can be addressed more fully in the D.C. Circuit even if the Court holds this petition. The bottom line remains that the orderly manner of proceeding is for the Court to hold or grant and expedite this petition.

C. The Requested Relief Is Modest And Entirely Warranted

1. The government's petition asks this Court in the first instance simply to hold this case pending the disposition of *Boumediene* and *Al Odah*, which is expected within the next few months. Once that decision issues,

this case may be dispensed of by the Court in an expedited fashion. And if the Court believes that further action is warranted at this juncture, the government has proposed expedited briefing and oral argument (which respondents have agreed to).

By contrast, as the government has explained (Pet. 28-32), if this Court denies this petition, the decision below will immediately put the government to the dilemma of either engaging in a practically infeasible attempt to recreate the information the recorder might have reviewed, or conducting mass remands of DTA cases for an additional round of CSRT proceedings in the midst of an ongoing armed conflict.[3] Recreating the historic record sought by the court of appeals may not even be possible, and the effort to do so would create a substantial diversion of valuable and limited intelligence, military and law enforcement resources. See Pet. 29-31; Pet. App. 182a-214a. The court of appeals explicitly acknowledged the dilemma it posed to the government, Pet. App. 62a-63a, and several judges noted the serious burdens and risks either option would entail, *id.* at 88a-89a (Henderson, J., dissenting from denial of rehearing en banc); *id.* at 95a-96a (Randolph, J., dissenting from denial of hearing en banc).

Respondents urge this Court to disregard the sworn testimony of the Nation's top intelligence officials on the burdens and national security risks created by the decision below. See Br. in Opp. 26-27, 30-31. But respondents ignore the massive undertaking that would be required to attempt to collect and review the classified information that the government would be required to

[3] Contrary to respondents' contention (Br. in Opp. 36 n.25), the latter option would not entail the same reconstruction of the "record" as the former option. See U.S. Stay Reply 10 n.3.

produce under the decision below. Pet. 29-30. Further, in some cases, disclosure of the material to anyone, even to the court, would violate agreements with foreign intelligence sources and would harm the government's ability to obtain information from such sources in the future. Pet. 30-31; Pet. App. 186a.[4] And the court of appeals correctly rejected respondents' suggestion (Br. in Opp. 28) that the government is to blame for these burdens and risks, explaining that the government had no reason to create the expanded "records" at the time of the original CSRTs. Pet. App. 62a.

The government will ultimately shoulder whatever burdens it must to provide constitutionally sufficient or statutorily-compelled judicial review for these detainees. But it makes no sense to put the government to this dilemma now, while the constitutional adequacy of DTA review remains sub judice. This Court's resolution of *Boumediene* and *Al Odah* may require additional steps to ensure that DTA review complies with the Constitution or may essentially moot the question here altogether. However those cases are resolved and whatever the ultimate contours of constitutionally-adequate DTA review, a hold or grant of this petition is appropriate.

2. This Court's consideration of this petition is warranted now, because the government will be unable to obtain meaningful relief at a later point in these proceedings. This case is ripe for review in all pertinent respects: The court of appeals has definitively ruled on

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[4] Respondents argue (Br. in Opp. 27, 29-30) that the fact that the government has shared classified factual returns with counsel in the habeas cases indicates that the government's national security concerns are unfounded. Those factual returns, however, are the same as the classified CSRT records that the government has already provided to counsel and agreed are the relevant basis for judicial review.

a question of law that is of fundamental importance in determining the nature and scope of DTA review, and if the government is not able to obtain review at this juncture, it will be denied any meaningful review at all. Indeed, respondents make no attempt to explain how, if certiorari were denied, the government would be able to obtain any meaningful review at a later date.

Contrary to respondents' suggestion (Br. in Opp. 15), the procedural posture of this case presents no impediment to this Court's review. It is well-established that certiorari review is available for interlocutory judgments, particularly where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case" and the decision below "will have immediate consequences for the petitioner." Robert L. Stern et al., *Supreme Court Practice* 259 (8th ed. 2002) (citing cases). Here, the question of the content of the record on review is an important threshold matter for DTA review, see Pet. 16-19; that question was throughly considered by the court below, see Pet. App. 1a-102a; and the court of appeals' resolution of that question will have serious consequences for the government and for national security, see Pet. 28-32. It is thus difficult to imagine a more compelling situation for interlocutory review.

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For the foregoing reasons, and the reasons set forth in the petition, the petition should be held pending this Court's decision in *Boumediene* v. *Bush* and *Al Odah* v. *United States*, and disposed of as appropriate in light of that decision. In the alternative, the petition should be granted and this case should be set for expedited brief-

ing and oral argument on the schedule proposed by the government, so that the case may be decided this Term.

Respectfully submitted.

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